TONGIAH JUMALI & ANOR

v.

KERAJAAN NEGERI JOHOR & ORS

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CIVIL SUIT NO: 22-23-1997]
14 MARCH 2003

ISLAMIC LAW: *Jurisdiction - Syariah Court - Apostasy - State enactment does not provide for conversion out of Islam - Whether jurisdiction of Syariah Court is implied when enactment provides for conversion into Islam - Whether civil courts have no jurisdiction*

CIVIL PROCEDURE: *Jurisdiction - High Court - Apostasy - State enactment does not provide for conversion out of Islam - Whether question of apostasy fell within jurisdiction of High Court - Whether jurisdiction of Syariah Court is implied when enactment provides for conversion into Islam - Whether civil courts have no jurisdiction*

The plaintiffs applied for declarations that: (1) the 1st plaintiff was a Christian and had left the religion of Islam, and was therefore not subject to the Islamic Laws of Johore; and (2) the marriage between them was valid. The defendants raised a preliminary objection that this court did not have the jurisdiction to hear the application as it was within the jurisdiction of the Syariah Court.

The issue was whether the Syariah Court had the necessary jurisdiction as the Johore Enactment did not have any provisions on conversion out of Islam.

Held:

[1] The Syariah Court has the jurisdiction to hear an application concerning conversion out of Islam whenever the relevant state enactment contains provisions regarding conversion into Islam (*Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia*, FC). In the instant case, although the Johore Enactment did not contain any provisions on conversion out of Islam, the said enactment contained provisions regarding conversion into Islam. Therefore, this application was within the jurisdiction of the Syariah Court. This court could not hear this action for want of jurisdiction. (pp 286 h-i & 287 g-h)

[PO upheld; application dismissed.]

Case(s) referred to:

Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors [1999] 3 CLJ 539 HC ***(refd)***

Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ 77 SC ***(refd)***

Daud Mamat & Ors v. Majlis Agama/Adat Istiadat Melayu, Kelantan & Anor [2001] 2 CLJ 161 HC ***(refd)***

Kamariah Ali lwn. Kerajaan Negeri Kelantan [2002] 3 CLJ 766 CA ***(refd)***

Lim Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang [1996] 3 CLJ 231 HC ***(refd)***

Majlis Agama Islam Negri Sembilan v. Hun Mun Meng [1993] 1 CLJ 179 HC ***(refd)***

Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 HC ***(refd)***

Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1997] 4 CLJ Supp 419 HC ***(refd)***

Ng Wan Chan v. Majlis Islam Wilayah Persekutuan (No 2) [1991] 3 MLJ 487 HC ***(refd)***

Re The Detention of Leonard Teoh Hooi Leong [1998] 1 CLJ 857 HC ***(refd)***

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia [1999] 2 CLJ 5 FC ***(foll)***

Legislation referred to:

Federal Constitution, arts. 11, 121(1A), 141(2)

Johore Administration of Islamic Law 1978 Enactment, ss. 138, 139, 140, 141

Other source(s) referred to:

Administration of Islamic Law in Malaysia Text & Material, Farid Suffian Shuaib, Tajul Aris Ahmad Bustami & Mohd Hisham Mohd Kamal, p 123

Civil and Syariah Courts in Malaysia: Conflict of Jurisdictions, Abdul Hamid Mohamad JCA, [2002] 1 MLJ cxxx, cxxxviii

Halsbury's Laws of England, vol 14, para 250.027

For the plaintiffs - Lee Min Choon (Eugene Yapp); M/s Lee Min Choon & Co
For the 1st & 2nd defendants - Iskandar Ali Dewa; State Legal Adviser's Office
For the 3rd defendant - Tee Keng Hock; M/s Reginald Vallipuram & Co

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:

When this action, in the main for declarations that the 1st plaintiff is a Christian (the 1st plaintiff claims that she has left the religion of Islam) and is therefore not subject to the Islamic laws of Johore and that the marriage between the plaintiffs is valid under the laws of Malaysia, was called for hearing, a preliminary objection was raised by the defendants to the effect that the court has no jurisdiction to grant the relief sought by the plaintiffs.

Mr. Tee Keng Hock for the 3rd defendant submitted that the power of the civil court to grant those declarations had been taken away by art. 121(1A) of the Federal Constitution. He submitted that in the State of Johore the applicable provision is s. 141 of the Administration of Islamic Law Enactment 1978 (Johore Enactment No 14 of 1978). Referring to the Federal Court case of *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia* [1999] 2 CLJ 5, he submitted that even if a State Enactment is silent, it must be assumed that the Syariah Court has jurisdiction to adjudicate on matters concerning conversion out of Islam. Then referring to the cases of *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, *Daud bin Mamat & 3 Ors v. Majlis Agama/Adat Istiadat Melayu, Kelantan & Anor* [2001] 2 CLJ 161, *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1997] 4 CLJ Supp 419 and *Abdul Shaik bin Md Ibrahim & Anor v. Hussein bin Ibrahim & 2 Ors* [1999] 3 CLJ 539, Mr. Tee further submitted that conversion out of Islam is within the proper province of the Syariah court who has inherent jurisdiction over the matter. "Even if the Syariah court could not give the remedy, the jurisdiction would not revert to the civil court. The plaintiffs should go to the Syariah Court. Article 11 of the Federal Constitution is not applicable. The application for a declaration does not vest the civil court with jurisdiction. The plaintiffs are trying to invoke art. 11 through the backdoor. There is no application under s. 141."

Mr. Iskandar Ali bin Dewa for the 1st and 2nd defendants expressed the same view. He counseled that the High Court could not decide on conversion out. "The jurisdiction is with the Syariah court ... Section 141 is the provision for conversion out, notwithstanding that it is not as comprehensive as the Negri Sembilan provision. This is a matter touching directly upon religion, a matter naturally within the Syariah Court. It is for the Kadi and not High Court to announce the conversion out. In *Daud bin Mamat*, the Court of Appeal affirmed that conversion out is a matter within the jurisdiction of the Syariah Court. Article 11 of the Federal Constitution is not applicable. There is no application for a declaration under art. 11. Article 11 must be exercised in accordance with written law."

Mr. Lee Min Choon for the plaintiffs said that *Soon Singh* is a watershed whenever jurisdiction is in issue. But he submitted that there should be a correct appraisal of *Soon Singh*. "*Soon Singh* merely settled the issue as to which court should a Muslim approach for a declaration. *Soon Singh* did not qualify art. 11. Article 11 remains sacrosanct. The Federal Court acknowledged that the civil courts have jurisdiction in certain circumstances. One must look at the relevant State Act. The Johore Enactment is unique. The words 'who has not

declared himself a non-Muslim' suggest that in Johore a Muslim has the right to declare himself a non-Muslim. Section 141(2) does not provide a judicial proceeding. Section 141(2) merely requires the Kadi to record and announce. It is an administrative function. Section 141(2) is not the procedure on conversion in and out. The deeming provision in the Kelantan and in the Negri Sembilan Enactments is not found in the Johore Enactment. The absence of the deeming provision shows that s. 141 is not any provision giving judicial function. Section 141 is a registration section. It cannot be treated as a confirming section. The Kadi 'shall announce' means that his function is administrative. Section 141 refers to the registration of conversion out that had taken place. The conversion out does not involve the Syariah Court. At least in the case of a muallaf, he declares himself out. A non-muallaf can declare out in any way he knows how, including a statutory declaration. The Johore Islamic Family Enactment 1990 defines a murtad as one who renounces the religion of Islam. Therefore, it is the person himself and not the Syariah Court, who pronounces he is in or out of the religion. The definition of a Muslim also says that it is the person himself who renounces. It is not an offence in Johore to convert out without going to the Syariah Court, as is in Kelantan. If there were such a requirement, the Johore Act would have provided so. The Johore Act allows a Muslim to convert out, on his own accord. *In Re: The Detention of Leonard Teoh Hooi Leong* [1998] 1 CLJ 857, the court accepted a statutory declaration as effective renunciation. It would appear that the Johore Enactment had taken the matter of conversion out of the Syariah Court. The present parties are non-Muslims. How could they appear before the Syariah Court? Even if the court should find that conversion out is within the jurisdiction of the Syariah Court, it could still rule on the validity of the civil marriage between the plaintiffs and on the false imprisonment of the 1st plaintiff by the 1st and 2nd defendants." Then referring to *Dalip Kaur*, Mr. Lee lastly submitted that the court could request for a fatwa, on the matter of a religious issue.

Mr. Tee replied that *Soon Singh* could not be distinguished. "In *Soon Singh*, the Federal Court held that conversion out even if it is not expressly provided for in a State Enactment must be read into the State Enactment by implication. The Federal Court clearly held that conversion out is a matter within the jurisdiction of the Syariah Court." Mr. Tee again stressed that conversion in and out should be matters for the Syariah Court. "Any *lacuna* in the Johore Enactment is no ground for us to say that the Syariah Court has no jurisdiction. In *Daud bin Mamat*, it was again held that conversion in and out are matters normally with the Syariah Court. The difference between the various State Enactments is not material. Given the purport of *Soon Singh*, it does not matter that the Negri Sembilan Enactment is more complete. The function of the Syariah Court is not administrative. In *Soon Singh*, the Federal Court suggested

that an application for a declaration is available from the High Court, after an application to the Syariah Court. Until an application has been made to the Syariah Court, art. 11 does not come into play. Article 11 is to be exercised in accordance with other written law. The absence of a deeming provision is irrelevant. A deeming provision will be superfluous. The fact that the defendants may not be Muslims does not detract from the fact that the issue is with regard to a matter within the jurisdiction of the Syariah Court." Mr. Iskandar replied that the power to the Syariah Court to deal with conversion out should be implied. "In *Dalip Kaur*, the Federal Court held that the power to keep a register of converts renouncing tantamount to a clear provision giving jurisdiction to the Syariah Court. That passage was approved by the Federal Court in *Soon Singh*". Then referring to *Majlis Agama Islam Negri Sembilan v. Hun Mun Meng* [1993] 1 CLJ 179, Mr. Iskandar submitted that conversion out must be in accordance with law. "The entire controversy revolves around the personal status of the 1st plaintiff. The issue is not about any tortuous wrong. Any wrong complained of is auxiliary to the status of the 1st plaintiff. The defendants were administrating the provisions of the Johore Enactment, and so there could be no wrong. There is no penal provision on conversion out, but that is not a relevant consideration."

There was no reply by Mr. Lee to the final submissions of his learned friends.

Several statements on the law were proffered by learned counsel. One was that *Soon Singh* is the watershed whenever the jurisdiction of the secular and ecclesiastical courts is in issue. But is it so that *Soon Singh* is a turning point in the opinion of the court on the matter of the jurisdiction of the civil court in a matter pertaining to conversion out of the religion of Islam. Hitherto, it was held, that there is no impediment for the civil court to hear and dispose of an application by an applicant for a declaration that he has renounced the Islamic faith if the State Enactment does not expressly empower the Syariah Court to adjudicate on the issue of conversion out or on the validity of an alleged renunciation (*Lim Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang* [1996] 3 CLJ 231), that where there is provision on conversion out in the State Enactment, that the provision in the State Enactment must be followed (*Majlis Agama Islam Negri Sembilan v. Hun Mun Meng* [1993] 1 CLJ 179), and that the jurisdiction of the Syariah Court to deal with any matter must be expressly conferred by state law and not derived by implication (*Ng Wan Chan v. Majlis Islam Wilayah Persekutuan (No. 2)* [1991] 3 MLJ 487). Thus it was held in *Ng Wan Chan (No 2)*, that the Syariah Court, in the absence of any provision in the State Enactment giving jurisdiction to the Syariah Court to determine whether a person is a Muslim or not, has no jurisdiction to adjudicate on that issue.

But it was also held on the other hand, that the jurisdiction to adjudicate on any purported renunciation of the Islamic faith lies with the Syariah Court even if express provisions are not provided in the State Enactment. Thus it was held by Mohamed Yusof SCJ, in *Dalip Kaur*, that the only forum qualified to answer the issue whether the deceased had renounced Islam during his lifetime is the Syariah Court, (see also *Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1993] 1 CLJ 264, where it was also held by Gunn Chit Tuan SCJ (as he then was) that the Syariah Court is the only forum qualified to answer whether a Muslim has renounced Islam). In *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1997] 4 CLJ Supp 419, Abdul Kadir Sulaiman J (as he then was) expressed the same view, but as follows:

> To my mind, having considered art. 74 and para. 1 of the State List in the Constitution, the jurisdiction of the syariah court is much wider than those expressly conferred upon it by the respective state legislature. The syariah court shall have jurisdictions over persons professing the religion of Islam in respect of any of the matters included in para. 1 thereof. It is not limited only to those expressly enacted. The matters include Islamic law and personal and family law of persons professing the religion of Islam. They include cognizance over offences by persons professing the religion of Islam against precepts of that religion. The fact that the legislature is given the power to legislate on these matters but it does not as yet do so, will not detract from the fact that these matters are within the jurisdiction of the syariah court within the contemplation of para 1 of the State List and which jurisdiction is ousted from the courts mentioned in art. 121(1) of the Constitution. If the state legislature has not as yet legislated specifically on the matter, it is within its competency to do so in the future by virtue of the powers given under art. 74 of the Federal Constitution. Therefore, when these matters are in issue, the jurisdiction is clothed in the syariah court and not in the courts mentioned in art. 121(1), notwithstanding the absence of express provisions in the state enactments at the time the issue arises. That is the intention of art. 121(1A) when it states in no uncertain term that the civil courts in art. 121(1), which include the High Courts, shall have no jurisdiction over the matter. The fact that the syariah courts have not been expressly conferred with the jurisdiction to adjudicate on the issue raised, by the state legislature, does not mean that the jurisdiction must be exercised by the courts in art. 121(1). The issue is not one whether a litigant can get his remedies but one of jurisdiction of the courts to adjudicate ...

Already for some time, there is clear case law that decided that the Syariah court has the jurisdiction to hear an application concerning conversion out (for further reading, see *Administration of Islamic Law in Malaysia Text & Material* by Farid Suffian Shuaib, Tajul Aris Ahmad Bustami & Mohd Hisham Mohd Kamal at p. 123). But the importance of *Soon Singh* lies in the fact that it

has most conclusively settled and answered the often-thorny question of the jurisdiction of the civil court to hear an application concerning conversion out (for further reading, see *Civil and Syariah Courts in Malaysia: Conflict of Jurisdictions* by Abdul Hamid Mohamad JCA [2002] 1 MLJ cxxx, cxxxviii). In short, it was the unmistakable answer of the Federal Court in *Soon Singh* to that question that the jurisdiction of the Syariah Court to deal with the conversion out of Islam, although not expressly provided in the State Enactments, can be read into them by implication derived from the provisions concerning conversion into Islam:

At p. 21, the Federal Court per Mohd Dzaiddin FCJ (as he then was) concluded as follows:

> From the analysis of the State Enactments, it is clear that all State Enactments and the Federal Territories Act contain express provisions vesting the Syariah Courts with jurisdiction to deal with conversion to Islam. On the other hand, only some State Enactments expressly confer jurisdiction on the Syariah Courts to deal with conversion out of Islam. In this regard, we share the view of Hashim Yeop A Sani CJ (Malaya) in *Dalip Kaur* p. 7 that:
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> > clear provision should be incorporated in all State Enactments to avoid difficulties of interpretation by the civil courts.
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> particularly in view of the new Clause (1A) of Article 121 of the Constitution which as from June 20 1988 had taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts. Be that as it may, in our opinion, the jurisdiction of the Syariah Courts to deal with the conversion out of Islam, although not expressly in the State Enactments can be read into them by implication derived from the provisions concerning conversion into Islam ... It is quite clear to us that the legislative purpose of the State Enactments and the Act is to provide a law concerning the enforcement and administration of Islamic law, the constitution and the organisation of the Syariah Courts and related matters. Therefore, when jurisdiction is expressly conferred on the Syariah Courts to adjudicate on matters relating to conversion to Islam, in our opinion, it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction of the Syariah Courts ... In short, it does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the Syariah Courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.

Therefore, it is clear that the Syariah court has jurisdiction to hear an application concerning conversion out, whenever the relevant State Enactment contains provisions regarding conversion into Islam (see also *Abdul Shaik bin Md Ibrahim & Anor v. Hussein bin Ibrahim & 2 Ors* [1999] 3 CLJ 539, 2479). Indeed, it was taken one step further in *Kamariah bte Ali lwn. Kerajaan*

Negeri Kelantan [2002] 3 CLJ 766, where it was held by the Court of Appeal that the issue of whether an individual is an apostate or not is one of Islamic law, and that the civil court has no jurisdiction to decide on that issue. Anyway, it is undoubtedly so, that the jurisdiction of the Syariah Court is express whenever the State Enactment contains provisions regarding conversion out of Islam, and that the jurisdiction of the Syariah Court is implied whenever the State Enactment contains provisions regarding conversion into Islam. Either way, it means that the civil court has no jurisdiction to hear an application concerning conversion out, as art. 121(1 A), the watershed provision with respect to the separate jurisdiction of the secular and ecclesiastical courts, of the Federal Constitution provides that "the courts referred to in cl. (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts".

It was contended that s. 141(2) of the Johore Enactment is not any procedure on conversion in and out. In effect, it was contended that the Johore Enactment contains no provisions regarding conversion out of Islam. It was contended that s. 141(2) of the Johore Enactment, when compared to the corresponding provisions in other State Enactments, falls rather short of a true provision on conversion out. But with respect, the Johore Enactment contains provisions regarding conversion into Islam (ss. 138, 139, 140 & 141). It was held in *Soon Singh* that "when jurisdiction is expressly conferred on the Syariah Courts to adjudicate on matters relating to conversion to Islam ... it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction of the Syariah Courts ... since matters on conversion to Islam come under the jurisdiction of the Syariah Courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts." "... the provisions of a relevant statute concerning conversion to Islam by implication confers jurisdiction on Syariah courts regarding matters of conversion from Islam" (*Halsbury's Laws of England,* vol. 14 para. 250.027). So even if it is true that the Johore Enactment contains no provisions regarding conversion out, it will still pan out that the Syariah court has jurisdiction, *albeit* implied, to hear an application concerning conversion out, to hear an application such as in the instant action. And since it is so, it is absolutely clear that this civil court cannot hear this action concerning conversion out, for want of jurisdiction. There is no alternative but to uphold the preliminary objection and strike off this action, with costs. Accordingly, it is therefore so ordered.